INDEX

Page

Opinions below ---------- 1
Jurisdiction ---------- 2
Statement of the case ---------- 2
Questions presented ---------- 4
Argument ---------- 5
Summary ---------- 5
Conclusion ----------14

Table of Cases Cited

A. W. Duckett & Co. v. United States, 266 U. S. 149, 45 S. Ct. 38, 69 L. Ed. 216 ----------7, 10, 12
Boston Chamber of Commerce v. Boston, 217 U. S. 189, 30 S. Ct. 459, 54 L. Ed. 725 ----------13
Carlock v. United States, 53 Fed. (2d) 926 ----------10
City of New York v. Sage, 239 U. S. 57, 36 S. Ct. 25, 60 L. Ed. 143 ----------10
Eagle Lake Improvement Co., et al. v. United States, 160 Fed. (2d) 182 ----------11
Gledhill v. State, 123 Neb. 726, 243 N. W. 909 ------- 7
Meadows v. United States, 144 Fed. (2d) 751 --------12
Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463 -------12
Olson v. United States, 292 U. S. 246, 54 S. Ct. 704, 78 L. Ed. 1236 ----------10
Silberman v. United States, 131 F. (2d) 715 -------7, 12
State of Nebraska v. United States of America, et al., 164 F. (2d) 866 ----------2, 4
State v. Platte Valley Public Power and Irrigation District, 147 Neb. 289, 23 N. W. (2d) 300, 166 A. L. R. 1196 ----------6, 7, 8, 14
State of Texas v. Harris County, etc., Navigation District, 158 Fed. (2d) 861 ----------12
United States v. Certain Lands in Borough of

Page

Brooklyn, 129 Fed. (2d) 577 ----------12
United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 33 S. Ct. 667, 57 L. Ed. 1063 ------10
United States v. City of New York, 165 Fed. (2d) 526 ---------- 9
United States v. Dunnington, 146 U. S. 338, 13 S. Ct. 79, 36 L. Ed. 996 ----------12
United States of America, Petitioner v. General Motors Corporation, 65 S. Ct. 357, 323 U. S. 373, 89 L. Ed. 311 ---------- 7
United States v. Indian Creek Marble Co., 40 Fed. Supp. 811 ---------- 9
United States v. Miller, 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 336, 147 A. L. R. 55 --------6, 8, 10
United States, ex rel. T. V. A. v. Pohelson, 319 U. S. 266, 63 S. Ct. 1047, 87 L. Ed. 1390 ----13
United States v. Sunset Cemetery Co., 132 Fed. (2d) 163 ----------12
United States v. State of Montana, 134 Fed. (2d) 194 ----------9, 16
United States v. Wheeler, 66 Fed. (2d) 977 ---------- 8
United States of America v. 19,573.59 Acres of Land, More or Less, Situated in Cheyenne County, State of Nebraska, 70 F. Supp. 610 ----- 1
United States v. 576.734 Acres of Land, More or Less, in Montgomery County, Pa., 143 F. (2d) 408 ----------7, 12
United States v. 25.936 Acres of Land, More or Less, in Borough of Edgewater, Bergen County, New Jersey, et al., 153 Fed. (2d) 277 ----------11
United States v. 150.29 Acres of Land, More or Less, in Milwaukee County, Wisconsin, et al., 135 Fed. (2d) 878 ----------12

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 687

STATE OF NEBRASKA, PETITIONER,

V.

UNITED STATES OF AMERICA, CLARA H. McNISH, T. C. SPIKER, AND RUSH C. CLARKE, SPECIAL ADMINISTRATOR OF THE ESTATE OF OLIVE E. JONES, DECEASED.

RESPONDENTS' BRIEF IN RESISTANCE TO PETITION FOR WRIT OF CERTIORARI.

MILTON C. MURPHY,
R. H. BEATTY,
LOWELL C. DAVIS,
PAUL L. MARTIN,
RUSH C. CLARKE,
R. P. KEPLER,
Attorneys for Respondents Clara H. McNish, T. C. Spiker and Rush C. Clarke, Special Administrator of the Estate of Olive E. Jones, Deceased.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court (R. 52) entitled *United States of America* v. 19,573.59 *Acres of Land,*

More or Less, Situated in Cheyenne County, State of Nebraska, is reported in 70 F. Supp. 610, and the opinion of the United States Circuit Court of Appeals (R. 219) entitled *State of Nebraska* v. *United States of America, et al.,* is reported in 164 F. (2d) 866.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered December 23rd, 1947, (R. 219). The petition for a Writ of Certiorari was filed March 23rd, 1948. The jurisdiction of this court is invoked under Sec. 240 of the Judicial Code, as amended, 28 U. S. C. A., Sec. 347 (a).

III.

STATEMENT OF THE CASE.

The Government of the United States on April 15, 1942, instituted condemnation proceedings to acquire title to some 19,573.59 acres of land in Cheyenne County, Nebraska, for use as an ammunition storage depot known as "Sioux Ordnance Depot," in conjunction with America's prosecution of World War II. Only two tracts of land, the fee title to which was in the State of Nebraska (State School Lands), is involved in this litigation. These tracts were designated in the original condemnation proceedings as tracts number 27 and 69. Tract number 27 involved 640 acres and comprised all of Section 16, Township 15, Range 50, Cheyenne County, Nebraska. This section of land had been leased by the State of Nebraska to one Clara H. McNish under School Land Lease from December 31, 1924, for a term of 25

years (Exhibit 5, R. 197-202). At the taking under condemnation the lease had an unexpired term of approximately 7 years 8 months yet to run and Mrs. McNish was in possession of the land as such lessee from the State of Nebraska.

Tract number 69 involved 640 acres and comprised all of Section 36, Township 15, Range 50, Cheyenne County, Nebraska. The State of Nebraska had on December 31, 1924, given a School Land Lease on 480 acres of this tract (North Half and the Southwest Quarter—36) to T. C. Spiker for a term of 25 years which at condemnation had approximately 7 years 8 months yet to run and which lands were then in possession of said Spiker as such state lessee (Exhibit 7, R. 207-212).

The state had on January 15, 1939, leased under School Land Lease for a term of 25 years to Olive E. Jones, 160 acres of tract number 69 (Southeast Quarter—36). This lease at condemnation had approximately 22 years 8 months yet to run and the land was in possession of the legal representative of Olive E. Jones, she having died after condemnation was instituted (Exhibit 6, R. 202-207).

The jury upon the trial of the cases in the United States District Court made the following awards as just compensation to the State of Nebraska and the lessees for the taking of their property rights in the lands condemned.

Tract No. 27:

Total just compensation	$19,840.00
To respondent State of Nebraska	14,080.00
To respondent Clara H. McNish	5,760.00

Tract No. 69:

Total just compensation	$18,560.00
To respondent State of Nebraska	12,800.00
To respondent T. C. Spiker	4,320.00
To respondent Rush C. Clarke, Special-Administrator of the estate of Olive E. Jones, deceased	1,440.00

From the United States District Court's judgment entered upon the jury's verdict the State of Nebraska appealed to the Circuit Court of Appeals (8 C. C. A.). The lower court's judgment was affirmed (R. 219). Also see *State of Nebraska* v. *United States*, 8 C. C. A., 164 Fed. (2d) 866.

QUESTIONS PRESENTED.

The State of Nebraska seeks herein to present to this court three question all of which in our view have heretofore been definitely determined by this court.

I.

Is a valid, unexpired State School Land Lease given by the State to a lessee for a valuable consideration such a property right that the Federal Government on a taking thereof for public use must make just compensation to the owner under the Federal Constitution,

II.

Does Federal or State law govern in a determination of what constitutes just compensation for property taken by the United States in its sovereign capacity for its public use?

III.

Can the State of Nebraska on condemnation of its State School Lands by the Federal Government for its public necessity, under constitutional provision, legislative act or court decision, lawfully demand that the Federal Government pay to the State the full fair marke value of the lands taken regardless of the condition of the State's title to the real estate at the time of the taking and without regard to encumbrances placed upon such title by the State and pay in addition thereto, the value of the leasehold interest therein, even though the combined interest so computed would exceed the value of the whole property taken?

ARGUMENT.

Summary.

Appellant bases its right to a review on writ of certiorari on the grounds (1) that the Federal Courts are bound by the construction made by the Supreme Court of Nebraska of (a) The Enabling Act of Nebraska, and (b) the leasehold interest of a lessee of State school lands; (2) That the decision of the Circuit Court of Appeals is in violation of the Fifth Amendment of the Constitution of the United States, in that it authorizes the taking of private property for public use without just compensation, and (3) That the question involved is one of great public interest and should be settled by this Court.

Respondent-lessees submit that no reason exists for the review of this case on writ of certiorari for the following summarized reasons, more specifically detailed in subsequent argument:

(1) A lessee of State school lands has a property right and interest therein which must be recognized and compensated for upon condemnation of the property covered by the lease.

(2) Since the case of *United States* v. *Miller,* 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 336, 147 A. L. R. 55, the rule has been firmly established by this Court that the measure of just compensation in a federal condemnation proceedings is a substantive matter and right grounded upon the Fifth Amendment to the Constitution of the United States and federal rather than local laws govern.

(3) The decision of the Nebraska Supreme Court in *State* v. *Platte Valley Public Power and Irrigation District,* 147 Neb. 289, 23 N. W. (2d) 300, 166 A. L. R. 1196 construing its law pertaining to the determination of "just compensation" in state condemnation proceedings involving school lands is not binding upon the federal courts in cases involving condemnation under the Constitution of the United States and federal statutes.

(4) The measure of "just compensation" under the Fifth Amendment for the taking of property in fee simple is the fair market value of the property in fee ownership at the time of taking irrespective of the number and kinds of interests existing in it.

(5) Respondents' evidence was specifically brought within the limitations of the Nebraska rule and the verdict of the jury awarding them compensation was fair and just and only such amount as they were entitled to receive both under the Nebraska rule and the rule adopted by the federal courts.

(6) The trial court correctly instructed the jury as to the governing rule of compensation and the method of apportioning the proceeds and the appellant received an award of "just compensation" by the verdict and judgment of the Court.

I.

There can be no doubt but that a lessee of State school lands for a term of years has a property right and interest therein which must be recognized and compensated for upon condemnation of the property covered by the lease.

United States of America, Petitioner, v. *General Motors Corporation,* 65 S. Ct. 357, 323 U. S. 373, 89 L. Ed. 311.

A. W. Duckett & Co. v. *United States,* 266 U. S. 149, 45 S. Ct. 38, 69 L. Ed. 216.

United States v. *576.734 Acres of Land, More or Less, in Montgomery County, Pa.,* 143 F. (2d) 408, (C. C. A. 3, 1944).

Silberman v. *United States,* 131 F. (2d) 715, (C. C. A. 1, 1942).

Gledhill v. *State,* 123 Neb. 726, 243 N. W. 909.

State v. *Platte Valley Public Power & Irrigation District, et al.,* 147 Neb. 289, 23 N. W. (2d) 300.

Appellant does not deny that such leases constitute property of have value for which compensation must be paid to the lessees and a contrary claim would hardly be permissible under the decisions of this Court and those of the Nebraska Court supra.

Appellant seeks to force the Federal Courts to adopt and be bound by the rule announced in the case of *State*

v. *Platte Valley Public Power & Irrigation District,* (supra) that in addition to the full fee value of the property (without regard to the interest of the lessees) which must be paid to the State the condemnor must also pay for the value of the leasehold interest separate from and in addition to the value of the fee, even though the two amounts exceed the value of the whole.

That is a correct statement of the Nebraska rule as applies to condemnation of State school lands in state condemnation proceedings.

But the considerations and concepts expressed in the Nebraska rule are not binding upon the Federal Courts in this proceeding. This Court in *United States* v. *Miller* (supra), definitely decided that what constitutes property and what is just compensation for its taking in a condemnation by the United States are not questions of state law but of federal law. In the Miller case Mr. Justice Roberts, speaking for the Court said:

> "We need not determine what is the local law, for the federal statutes upon which reliance is placed required only that, in condemnation proceedings, a federal court shall adopt the forms and methods of procedure afforded by the laws of the state in which the court sits. They do not, and could not, affect questions of substantive right,—such as the measure of compensation,—grounded upon the Constitution of the United States."

In *United States* v. *Wheeler,* 66 Fed. (2d) 977 (C. C. A. 8), Circuit Judge Stone said:

> "The Fifth Amendment prohibits the United States from taking private property for public use without just compensation and those entitled to the

> protection of that provision cannot lose that right because of any state constitution, statute or judicial decision."

In *United States* v. *Indian Creek Marble Co.*, 40 Fed. Supp. 811 (D. C. Tenn.), District Judge Taylor said:

> "The State of Tennessee cannot by statute or by decision fix either a greater or less compensation for land taken by the United States than the Constitution of the United States provides, which is just compensation. It is inconceivable that the contention would be seriously made that either the Supreme Court of Tennessee or the Legislature of Tennessee could by express decision or legislation define 'just compensation' as employed in the Constitution of the United States so as to require the United States to pay a citizen of Tennessee a greater sum for taking a fee or an easement than it would be required to pay a citizen of another state for a fee or easement of exactly the same value."

In one of the last judicial pronouncements of this rule in *United States* v. *City of New York*, 165 Fed. (2d) 526 (C. C. A. 2), Circuit Judge Hand said:

> " 'Just compensation' is a federal question, as to which the state decisions are not authoritative."

In *United States* v. *Montana, State of*, 134 Fed. (2d) 194, (C. C. A. 9) the federal government sought to condemn state school lands in the State of Montana. The state court had held that title to such lands could not be acquired by eminent domain. Since the Montana Enabling Act provided that such lands should "be disposed of only at public sale after advertising." The State contended, relying upon the decision of its Supreme Court, that such lands could not be condemned. The Circuit

Court of Appeals held that the rule of the Montana Supreme Court interpreting the statute was not binding upon the federal courts. Writ of certiorari was denied in 63 S. Ct. 1438, 319 U. S. 772, 87 L. Ed. 1720.

Obviously appellant is entitled to "just compensation" for the taking of its property. Neither respondent lessees nor the government deny this. The measure of "just compensation" under the Fifth Amendment of the Constitution of the United States for the taking of property in fee simple is the fair market value of the property in fee ownership as of the time of taking, irrespective of the number and kinds of interests existing in it.

United States v. *Miller*, (supra).

Olson v. *United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. Ed. 1236.

A. W. Duckett & Co. v. *United States*, (supra).

City of New York v. *Sage*, 239 U. S. 57, 36 S. Ct. 25, 60 L. Ed. 143.

United States v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 33 S. Ct. 667, 57 L. Ed. 1063.

In *Carlock* v. *United States*, 53 Fed. (2d) 926, the Court said:

> "The proper rule governing condemnation proceedings in cases of this sort is stated in Mayor & City Council of Baltimore, et al. v. Gamse & Brother, 132 Md. 290, 293, 104 A. 429, 430, cited in the brief of counsel for the government, where the court said: 'In proceedings instituted to condemn the reversionary interest, as well as the leasehold interest, the rule is to ascertain the entire compensation to be allowed as though the entire title or estate in the property belong to one person, and then apportion

the sum between the holders of the different interests, according to their respective rights. Baltimore City v. Latrobe, 101 Md. 629, 61 A. 203 (4 Ann. Cas. 1005). As was said by this court, speaking through Chief Judge Boyd, in the case last cited: 'The condemning party, as a rule, ought not to be required to pay for the two interests more than the portion taken would be worth if owned by one person. * * * The jury, or other tribunal authorized to make the award, should always keep the value of the entire property in mind, and should limit the whole amount to be paid to that value, unless it is clearly shown that the lessee is entitled to more than the difference between what they allowed the reversioner and what the whole property would be worth in the market, if there had been no ground rent.'

"When the entire property included in a lease is taken, the question is one of comparatively easy solution, although there may be, as in this case, two separate estates therein, held by different parties. In such cases the rule stated above may ordinarily be applied without difficulty."

In *Eagle Lake Improvement Co., et al.* v. *United States,* 160 Fed. (2d) 182, the Court said:

"The sum determined to be due for the taking is apportioned between the claimants, but, 'as between the condemner and condemnee the property is valued as a whole.' "

In the case of *United States* v. *25.936 Acres of Land, More or Less, in Borough of Edgewater, Bergen County, New Jersey, et al.,* 153 Fed. (2d) 277, (C. C. A. 3) the Court said:

"It is settled that when land in which various persons have separate interests or estates is taken

by the United States for public use, the amount of compensation to be paid must be determined as if the property was in a single ownership and without reference to conflicting claims or liens. See Meadows v. United States, 4 Cir., 144 F. 2d 751, 752, 753; United States v. 576.734 Acres of Land, 3 Cir., 143 F. 2d 408, 409. The compensation paid is for the land itself and the value of the separate interests cannot exceed the worth of the whole. See 2 Lewis, Eminent Domain, 3d Ed., p. 1253; 1 Nichols, Eminent Domain, 2 Ed., pp. 707, 708."

See also:

Duckett & Co. v. *United States,* (supra).

United States v. *Dunnington,* 146 U. S. 338, 13 S. Ct. 79, 36 L. Ed. 996.

State of Texas v. *Harris County, etc., Navigation District,* 158 Fed. (2d) 861.

Meadows v. *United States,* 144 Fed. (2d) 751 (4 Cir.).

Silberman v. *United States,* (supra).

United States v. *576.734 Acres of Land,* 143 Fed. (2d) 408, (3 Cir).

United States v. *Certain Lands in Borough of Brooklyn,* 129 Fed. (2d) 577, (2 Cir.).

Monongahela Navigation Co. v. *United States,* 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463.

United States v. *150.29 Acres of Land, More or Less, in Milwaukee County, Wisconsin, et al.,* 135 Fed. (2d) 878, (7 Cir).

United States v. *Sunset Cemetery Co.,* 132 Fed. (2d) 163, (7 Cir.).

As was pointed out by Circuit Judge Johnsen in the opinion of the Circuit Court of Appeals in this case, the cases relied upon by appellant in support of a contrary

rule (*Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 30 S. Ct. 459, 54 L. Ed. 725; *United States, ex rel. T. V. A.* v. *Pohelson*, 319 U. S. 266, 63 S. Ct. 1047, 87 L. Ed. 1390 and others) are distinguishable from the present case as instances of departure from the general rule that the jury should determine the value of the property as a whole and then divide this amount among the respective interests in it. Those cases involved exceptional circumstances which are not presented in the case at bar.

On trial of the issue of just compensation in the present case, the District Court instructed the jury to determine the fair market value of the property at the time of taking as the measure of the Government's obligation for their condemnation. This value was required to be set out in the verdict. The jury was further instructed to find the fair market value of the lease on each section; to return a verdict for this amount as the compensation due the lessee; to subtract this amount from the market value found for the land; and to return a verdict for the difference as the compensation due the State. The verdict thus rendered represented the just compensation to which both the State and the lessee were entitled under the well esablished rules adopted by the federal courts. The compensation obligation of the United States was not increased by the fact that the State held the lands for the benefit of its common school system nor did the Federal Government in granting these lands to the State agree that it would pay more than the fair market value of the lands in condemnation. The State has received just compensation for its property in these lands so taken. The lessees have received nothing more than their just compensation for their prop-

erty so taken. The testimony of all of the witnesses for the lessees was specifically brought within the limitations of the Platte Valley Public Power & Irrigation District case (supra) that the lessee's interest in Nebraska school lands is compensable only in so far as the lease rights have a value over and above six per cent per annum of the fair market value of the land, which is the amount of rent that the statute contemplates shall be paid to the State.

CONCLUSION.

Respondent lessees therefore submit that the decisions below are correct and should be affirmed and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 30, 1948.